SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 890

SAMUEL GILBERT, et al., stockholders of Glen Alden Corporation, suing on behalf of themselves and all other Stockholders of said Corporation, and for the benefit of and in the right of said GLEN ALDEN CORPORATION,

Petitioners,

against

FRANCIS O. CASE, DUDLEY G. LAYMAN, ALBERT A. LIST, ROYAL B. LORD and GLEN ALDEN CORPORATION,

Respondents.

BRIEF BY THE RESPONDENTS IN OPPOSITION

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BRIEF BY THE RESPONDENTS IN OPPOSITION

Opinions Below

No opinions were rendered by the Appellate Division in making the Orders appealed from. The opinion of the New York Court of Appeals dismissing petitioner's appeal to that Court from the decision of the Appellate Division appears at page 32 of Appendix to the Petition* and is reported at 20 N. Y. 2d 747. The decision of the New York

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* Herein "Pet. App."

Court of Appeals denying plaintiff's motion for leave to appeal to that Court from the Orders of the Appellate Division as to which certorari is sought appears at page 32 Pet. App. and is reported at 20 N. Y. 2d 637.

Jurisdiction

The first Order of the Appellate Division (intermediate Appellate Court) of the Supreme Court of the State of New York as to which petitioner seeks a writ of certiorari (Pet. App. 1) was entered November 21, 1966, and the second order of that same Court was entered September 19, 1967 (Pet. App. 25-26). The petition for a writ of certiorari was filed December 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., § 1257 (3).

Questions Presented

Whether the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department was correct in denying a motion five years after the event by petitioners (a) to vacate the June 12, 1961 Order of the Appellate Division reversing the judgment of the Supreme Court of Kings County upon the decision of that Court after trial awarding plaintiffs a specified sum from the individual respondents and dismissing the complaint; and (b) to vacate the judgment entered June 30, 1961 upon the said June 12, 1961 Order. (See 13 A. D. 2d 982, aff'd 11 N. Y. 2d 960).

Whether the New York Court of Appeals was correct in (1) dismissing the appeal from the denial by the Appellate Division of the motion to vacate on the ground that the Order appealed from was non-final; (See 20 N. Y. 2d 741; Pet. App. 32); (2) thereafter denying leave to appeal to the Court of Appeals from the Order of the Appellate Division. (See 20 N. Y. 2d 637; Pet. App. 32.)

Whether the Appellate Division was correct in denying (Pet. App. 25-26) leave to appeal to the Court of Appeals on certified questions.

Rule Involved

Revised Rules of the Supreme Court of the United States.

Rule 19. Considerations governing review on certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Statement

Petitioners, shareholders of the corporate respondent, Glen Alden Corporation, had in April, 1958 sued derivatively to surcharge the other respondents. After trial, petitioners recovered on December 31, 1959 a judgment against the respondents (197 N.Y.S. 2d 623).

Respondents appealed to the Appellate Division, Second Department. The appeal was heard on June 12, 1961. The bench consisted of Judge Beldock, Acting P.J. and Justices Christ, Pette, Ughetta and Kleinfeld. The judgment of the lower Court was reversed by a 3-2 vote, Justices Beldock, Christ and Pette voting for reversal and Justices Ughetta and Kleinfeld voting to affirm (13 A. D. 2d 982).

Prior to the commencement of argument, Justice Beldock informed all counsel present that he was interested in a charitable and philanthropic organization and that Mr. List, one of the defendants, was also interested in the same organization. He stated very definitely that he wished to make this fact known in order that any party to the litigation might have the opportunity to object to his hearing the appeal, and indicated that if any party to the litigation believed that this would in any way influence his decision he would withdraw from the case. All counsel present, including the attorney for the petitioner, affirmatively indicated that they had no objection to Mr. Justice Beldock's participation (Pet. App. 12, 13, 14, 15, 16, 17 and 18).

Petitioners appealed to the Court of Appeals, the highest court in New York, which unanimously affirmed the decision of the Appellate Division (11 N. Y. 2d 960).

Approximately five years later, on or about September 4, 1966, the petitioner moved in the Appellate Division to vacate the order of reversal entered June 12, 1961 and the judgment entered thereon on the asserted ground that "the order of reversal made by (said) Court is utterly void, due

to the disqualification of the then Acting Presiding Justice (now Presiding Justice) George J. Beldock (Pet. App. 2-3)". In the affidavit of the attorney for the petitioners upon which the motion was based (Pet. App. 4-10) it is suggested that the New York Court of Appeals had been induced to entertain and decide the appeal from the reversal in June of 1961 by the Appellate Division of the judgment in favor of the petitioners by the Trial Court as a result of a fraud purporting, according to the attorney, to flow from the refusal of Mr. Justice Beldock to disqualify himself from hearing in the Appellate Division in 1961 the appeal from the Trial Court's judgment in favor of the petitioners. The grounds asserted for compulsory disqualification are that at the time the appeal was heard in the Appellate Division there existed a close business and personal relationship between Presiding Justice Beldock and one of the respondents, Albert A. List. Examination of the attorney's affidavit discloses that this relationship is asserted to have existed through a charitable organization known as "Brotherhood-in-Action" of which Presiding Justice Beldock was one of the founders, and Honorary President, and of which respondent List is asserted to be Chairman of the Board of Directors.

In opposition to petitioners' motion in the Appellate Division there were submitted affidavits of Arthur F. Driscoll, a member of the bar of the State of New York for over fifty years, and then senior member of the firm of O'Brien, Driscoll & Raftery, John F. Wood, a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, and of two other attorneys who were present on November 10, 1960 when the appeal from the judgment of the Trial Court was argued (Pet. App. A12, 13, 14, 15, 16, 17 and 18). These affidavits demonstrate that at the outset of the argument in the Appellate Division on November 10, 1960 Justice Beldock had stated that he had a connection with one or more charitable organizations with which the

respondent List was connected, and that when Justice Beldock made that statement each of the counsel present at the time of the argument, including counsel for the petitioners herein, stated that this fact would not stand in the way of Justice Beldock participating in the consideration and decision of the case as far as each of them was concerned.

The Appellate Division of the Second Department considered the motion by the petitioner all five justices (excluding Justice Beldock) unanimously denied the motion Pet. App. 1).

Petitioner thereupon sought to appeal from that denial to the New York Court of Appeals. That Court dismissed the appeal unanimously (except that Chief Justice Fuld and Justice Keating took no part) on the ground that the Order appealed from did not finally determine the proceeding within the meaning of the Constitution (20 N. Y. 2d 741; Pet. App. 32).

Petitioner then moved the Court of Appeals for leave to appeal to that Court. This motion was denied (20 N. Y. 2d 637; Pet. App. 32).

Petitioner then moved (Pet. App. 27-31) in the Appellate Division for leave to appeal to the New York Court of Appeals upon certified questions. This motion was on September 19, 1967 unanimously denied (Pet. App. 25-26).

Argument

1. Assuming, *arguendo*, that the motion by petitioner in the Appellate Division would constitute a "case" or "controversy" within the purview of Article III of the Constitution of the United States, it is clear that the request for a writ should be denied for all of the following reasons, any one of which is normally independently sufficient for denial: (a) there is no final judgment or decree, (b) the

decision which petitioner seeks to review is not that of the highest court of the State of New York, (c) no substantial Federal question is presented, (d) that question, if presented, was not properly raised and preserved in the courts of the State of New York, and (e) in any event, the decisions of the New York Appellate Division and Court of Appeals rests upon state grounds which independently and adequately support the results reached.

2. This Court has uniformly announced that its power to issue a writ of certiorari will only be used when the Court is satisfied that in the circumstances it is of a character appropriate for the exercise of the important discretion which the Court has in the area. This discretion, the Court has repeatedly said, is intended primarily to be used in the broad interests of jurisprudence and uniformity of decision and to give the Supreme Court such supervision as would avert diversity of judgments and guard against inadvertence of conclusions in controversies involving weighty and serious measures (*In re Woods,* 143 U. S. 202; *Forsyth* v. *Hammond,* 166 U. S. 506, 513-515). This Court has held that its power under certiorari jurisdiction should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, particularly where it is important to secure uniformity of decision (*Hamilton-Brown Shoe Co.* v. *Worth Bros. and Co.,* 240 U. S. 251; *Magnum Import Co.* v. *Coty,* 262 U. S. 159).

It is submitted that under the facts of the instant case there is no necessity for invoking the extraordinary jurisdiction of the Supreme Court under the certiorari statute, since there are no questions of public importance presented (*Layne & Bowler Corporation* v. *Western Weld Works,* 261 U. S. 387).

The gravaman of the petitioner's argument here is that as a matter of fact there were circumstances present which required a reversal of a judgment entered five years prior

to the beginning of the instant proceeding. This constitutes an essential attempt to have this Court review evidence and discuss specific factual contentions, a procedure which the Court has in the past declined to adopt (*United States* v. *Johnston,* 268 U. S. 220; *Houston Oil Co. of Texas* v. *Goodrich,* 245 U. S. 440).

Petitioner seeks essentially to re-litigate a matter of private concern between himself (indeed, between his counsel) and respondent List, a practice which the Court has viewed with disfavor in the past (*Forsyth* v. *Hammond, supra*) or, at the very least to give him in this Court the hearing the New York State courts below have thrice denied him, a practice which this Court has found equally inappropriate (*Magnum Import Co.* v. *Coty, supra;* see also: *New York Cent. & H.R.R. Co.* v. *Kinney,* 260 U. S. 340).

In summary, the application to this Court is a startingly appropriate one for the application of the doctrine that certiorari, being a highly selective process, should be exercised in the interests of the law, not in the interest of particular parties. No suggestion is made by petitioner that there is a need for the writ to be issued in order to secure harmony of decisions or to settle questions of general importance in the administration of Federal justice (Robertson and Kirkham's *Jurisdiction of the Supreme Court of the United States,* 1951 ed., p. 591).

Indeed, no more fitting case for the application of the principles stated by the Court itself in its Rule 19, *supra,* can be conceived.

3. Examination of petitioner's initial motion in the Appellate Division of the New York Supreme Court (App. 2-10) compels the conclusion that no Federal question was properly presented, or if presented, preserved, in the Courts of the State of New York, and indeed, if any were presented, they were insubstantial at most. This Court from the time of its foundation has adhered to the principle

that it will not review judgments of State Courts that rest on adequate and independent State grounds (*Herb* v. *Louisville & Nashville Railroad Company*, 224 U. S. 117, 125). It is essential to the jurisdiction of this Court in reviewing the decision of the Court of the State that it appear affirmatively from the record not only that a Federal question was presented for decision in the highest court of the State having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (*Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54).

There is not in this record any holding by the highest Court of the State of New York that a Federal statute or treaty is repugnant to the Federal Constitution; nor has the highest Court of the State of New York sustained the validity of a State statute against the claim that it is repugnant to the Federal Constitution, treaties or law; nor is the converse of any of the foregoing propositions presented.

This is not a case in which there is an asserted conflict between a decision of the highest Court of the State of New York and any Federal Court of Appeals, or of any other State.

This is not a case involving a construction or application of Federal statutes or treaties.

At best, petitioner here asserts he was denied due process of law because a Justice who had disclosed the possibility of a remote connection with only one of many litigants sat on, and participated in the determination of a matter five years previous.

He now seeks to invoke in support of his contention Section 14 of the Judiciary Law of the State of New York. Petitioner does not claim that Mr. Justice Beldock had any interest in the subject matter of the above action or in the

outcome of the trial directly or indirectly. Section 14 of the Judiciary Law provides that a judge is not disqualified unless he has an interest in the subject matter of the litigation. This interest must be to the extent that the judge would personally gain or lose according to the outcome of the litigation (*Matter of Ryers, et al.*, 72 N. Y. 1, 15; *Matter of Carter*, 193 App. Div. 356; *Long* v. *Stites*,, 63 F. 2d 855, 858. *Carmody-Waite,* NEW YORK PRACTICE, Vol. 1, p. 244; CORPUS JURIS SECUNDUM, Vol. 48, p. 1046). Brotherhood-In-Action, through which the allegedly disqualifying relationship existed, was not a party to the above action and had no interest in the outcome nor does the petitioner claim that Mr. Justice Beldock had any interest in the subject matter of the above action or in the outcome of the trial directly or indirectly.

Ten of the Appellate Justices of the courts of the State of New York have listened to and unanimously refused to give credence to petitioner's current assertions.

Respondents concede that the proper administration of justice requires an impartial judiciary. In a proper case it is quite possible that the facts might warrant review by this Court where the impartiality of the justices who considered the matter below is brought into question. This Court's real concern with constitutional due process might in a proper case be considered to require review in such circumstances because it was a substantial Federal question essential to the administration of equal justice. Here, however, at best the charge is that because one of at least sixteen respected Justices of the State of New York might, by reason of a remote association with one of four individual defendants, have had, despite his offer to disqualify himself, greater reason for disqualification than those he announced to the counsel before hearing the argument of the appeal, a judgment entered in 1961 should be vacated. Such a proposition is hardly one which is of a gravity sufficient to require the attention of this Court.

CONCLUSION

Petitioner's application should be denied.

Respectfully submitted,

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